



# California Fair Political Practices Commission

March 30, 1989

David H. Kirkpatrick  
Attorney at Law  
National Economic Development & Law Center  
1950 Addison Street  
Berkeley, CA 94704

Re: Your Request for Informal Assistance  
Our File No. I-89-150

Dear Mr. Kirkpatrick:

This is in response to your letter dated March 1, 1989 in which you discuss the application of the Commission's opinion in In re Siegel (1977) 3 FPPC Ops. 62 to nonprofit housing corporations. Since your letter does not seek to clarify the duties of a specific person or entity under the Political Reform Act<sup>1</sup> (the "Act"), we consider your request to be one for informal assistance.<sup>2</sup>

As you are aware, the Siegel opinion sets forth a four-part test to determine whether an organization is a "government agency" for purposes of the Act. The first component of this test determines whether the impetus for formation of the organization originated with a government agency. You criticize this component as being too vague and difficult to determine. On this basis, you ask the Commission to abandon the Siegel test entirely and instead analyze whether a government agency exerts "control" over the organization in question.

We have considered your proposal but decline to accept it. While we agree that the "impetus" test may be difficult to apply in certain cases, we also feel that the "control" test you suggest presents equal difficulties in application. Furthermore, the "control" test, if implemented, may encourage government agencies

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<sup>1</sup> Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated.

<sup>2</sup> Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Government Code Section 83114; 2 Cal. Code of Regs. Section 18329(c)(3).)

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to form independent organizations providing traditional governmental services with public funds merely to avoid the requirements of the Act.

The Act obligates the Commission to ensure that public officials "perform their duties in an impartial manner, free from bias caused by their own financial interests...." (Section 81001(b).) The Commission is also obligated to liberally construe the Act to accomplish its purposes. (Section 81003.) In consideration of these duties, we feel that it is best to continue to apply the Siegel test when determining whether an organization is or is not a "government agency."

Finally, you have submitted to the Legislature a proposed amendment to Section 82041, which defines the term "government agency." The proposed amendment is consistent with the "control" test discussed above. You have asked if the Commission would be amenable to this, or a similar, amendment to Section 82041.

As noted above, the Commission staff is not in favor of implementing a "control" test in place of the test set forth in Siegel. Consequently, we would advise the Commission against such a proposal if it were formally presented to the Commission at a public meeting. However, if you desire that your proposal be formally presented to the Commission at a public meeting, please direct your request, in writing, to Diane M. Griffiths, the Commission's General Counsel. If you desire to have the matter heard as early as the May 2, 1989 Commission meeting, please submit your request no later than April 14, 1989.

I hope that this reply has been of assistance. However, if you have further questions, please contact me at (916) 322-5901.

Sincerely,

Diane M. Griffiths  
General Counsel

  
By: Scott Hallabrin  
Counsel, Legal Division

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March 1, 1989

Scott Hallabrin  
Counsel, Legal Division  
California Fair Political  
Practices Commission  
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Sacramento, CA 95804-0807

Re: A-88-422

Dear Mr. Hallabrin:

Thank you for sending me the regulations on requesting opinions and informal advice. Unfortunately I am still unclear how best to proceed after reading them. Please consider this letter a request in the alternative for an opinion, informal advice or for assistance in formulating a legislative response to our particular situation.

As I indicated to you on the phone, this office represents the South Berkeley Community Housing Development Corporation which was the subject of your ruling dated December 2, 1989, as well as more than 20 other nonprofit organizations that are substantially funded by local government agencies in the Bay Area. Your opinion uses the four part test of In re Siegel (1977) 3 FPPC Ops. 62 in determining whether or not the nonprofit is a local government agency. As I read your opinion, coverage for a nonprofit housing development corporation largely turns on whether the impetus for the formation originated with a government agency. Nonprofit housing development corporations are commonly substantially funded by local government, meeting the second criterion. You appear to view the development of housing, no matter how directed and controlled, as a governmental function satisfying the third criterion. You view the fourth test as irrelevant.

Our difficulties with having everything turn on impetus for formation of the corporation in the context of a housing development corporation are at least four fold. First, it is not always clear where the impetus comes from. Many of our clients put pressure on the city to give their neighborhood an equal share of housing development dollars, leading the city to say that it would fund a corporation meeting certain specified characteristics. The corporation would then be formed, controlled by the community, not the city, but funded by the city. Is the impetus from the city or from the community?

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A second concern is the vagueness of impetus. How close a connection is required? Is responding to a request for proposals enough? Is being formed after a city study of the local need sufficient? Is some city specification of the actual project required? Each of the organizations that we represent has a unique set of facts with different types of city involvement in their formation.

A third concern, and perhaps the most fundamental one, is that the test implies that once the impetus for the formation of the corporation originates with a government agency, the nonprofit remains a government agency forever, so long as it is funded by the government agency and does housing. This makes no sense in terms of the groups that are active in California. You indicated over the phone that you thought that this ruling was a narrow one that would not cover many other groups. If so, why should the South Berkeley Community Housing Development Corporation be a government agency and other housing development corporations not be one after their first project. In subsequent projects it would seem clear that they will be operating in the same manner, with the same independence of local government that other housing development corporations have. Why should the facts of the formation affect anything more than the activities that are directly mandated by the formation? Why should some organizations be government agencies forever and others operating identically not be?

A final concern is that many of our client groups have been in operation for up to 25 years. Even those that have only been in existence for four or five years have had turnover. They no longer know all of the facts surrounding the formation of the organization and the involvement with a local government agency. They are unable to determine whether or not the impetus for their formation originated with a government agency. Many of these organizations have dissident staff members who have been terminated who do have that knowledge of the origins of the corporation and could use that knowledge or claimed knowledge to threaten the organization.

Inherent in all of these difficulties is the notion that "impetus" makes very little sense in the context of city funded housing development corporations. Control would be a far more relevant and useful test. During the last 20 years a well developed pattern of having at least three distinctly different segments of the housing industry has been established. No one would claim that the private sector that develops housing, even if they use state funds, would be a local government agency. No one would claim that a public housing authority or a redevelopment agency is not a public agency. The nonprofit sector in the housing area has been recognized as being most useful where it brings independence of local government in its ability to leverage other funds and skills in the community.

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Where governmental agencies establish a nonprofit that they control, they are not reaching out to other funding sources and community involvement. The governmentally controlled nonprofit should be a local government agency.

Most housing development corporations, including South Berkeley Community Housing Development Corporation, are not controlled by local government. They are structured to be responsive to the community, to leverage volunteer efforts in the community, and to be eligible to leverage other sources of funds. The whole purpose of this strategy is to develop a nonprofit sector, independent of government, to address needs that government is not well positioned to address. Your current test does not mesh with this trend in the housing industry. A test based on control would.

I am requesting assistance for clarifying this situation on behalf of the universe of governmentally funded housing development corporations. I could bring each group in individually presenting the facts of their formation to the extent that they are known. I would hope, however, to convince you that even though you may be bound by past decisions to the "impetus" approach, that the control approach makes more sense in fulfilling the intent of the statute. If that is the case, a minor legislative change would seem the easiest way to address the issue.

I mentioned when I talked with you by phone that I had submitted a bill to address this issue. Enclosed is the brief language that was submitted to legislative counsel. I do not know how it reads after review by legislative counsel, nor do I know a bill number yet. I am not tied to the language submitted. I suspect that it may be over broad. What I would most like, if your agency would be amenable, is assistance in figuring out what language would address the test in the current situation without messing up the rest of your regulatory scheme. Are you amenable to considering a control test instead of an impetus test, at least in the housing development corporation context? How would you suggest that we proceed?

I would appreciate hearing from you at your earliest convenience, at least as to what the options are for proceeding with this matter.

Very truly yours,



DAVID H. KIRKPATRICK  
Attorney at Law

Government Code Section 82041.

"Local government agency" means a county, city or district of any kind including school district, or any other local or regional political subdivision, or any department, division, bureau, office, board, commission or other agency of the foregoing. "Local government agency" shall not include a non profit corporation funded by a local government agency unless the board of directors of the non profit corporation is directly or indirectly appointed by that local government agency.

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